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DECLARATORY JUDGMENTS*

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The profession has taken hold with a vigorous hand of a plan to enable persons who have an actual controversy as to their rights in certain circumstances to have an authoritative and binding declaration of their rights by the court before there is an actual breach by one and an actual loss by another, thereby avoiding the legal combat or loss by either party. The purpose is laudable—the bar has manifestly not only an interest, but an unselfish interest, in devising and indorsing the plan. It is a new step in procedural law.

It is a reform and therefore may be met with hesitancy and conservatism that may or may not ultimately prevent the accomplishment of the object. I feel sure that the Kentucky bar will hear a discussion of the question with a willingness to accept it if on investigation it is found valuable. Nothing but good can come of the discussion. The law is a growth; it must and will adapt itself to the growing needs and demands of society. It devolves upon the bar to lend full assistance in directing this adjustment.

The original power of judicature by the fundamental principles of society is lodged in society at large. (1 Bl. Com. 267.)

The life of the law has not been logic, it has been experience. (Holmes' Common Law, p. 1.)

*This paper is a reprint of an address delivered July 7, 1921, before the Kentucky Bar Association. It is published here by the kind permission of the author and of the Secretary of the Bar Association.

The Kentucky State Bar Association by resolution on July 7, 1921, unanimously endorsed the principle of Declaratory Judgments and authorized a committee to seek the passage of such an Act by the Kentucky Legislature. The Louisville Bar Association also at a recent meeting adopted the principle without dissent, and directed the appointment of a similar committee.

Most men are honest. Lawsuits for the most part arise from an honest difference of opinion as to the rights of the parties; often it is a difference of opinion entertained by the parties, perhaps more often a difference of opinion between counsel.

If the parties could find out their rights before acting, their action would conform most frequently to their rights. If counsel had means of knowing with reasonable certainty the rights of their clients, their clients would be saved loss by acting within their rights. It is an accepted principle that the courts' aid may not be invoked until a wrong is committed nor unless the judgment is to be enforced by process for immediate relief. The principle is tersely stated in *Woods v. Fuller*, 61 Md. 457:

"A court of equity will not take jurisdiction unless it can afford immediate relief. . . . It must be borne in mind that the decree of a court of equity, and not its opinion, is the instrument through which it acts in granting relief. However sound and clear such opinion may be, as an abstract proposition of law, yet if the principle it declares can not be carried into effect by a decree, in the case in which it is given, it is wholly valueless, and an idle and nugatory act."

The courts have "refused to allow parties to appear in court, except under conditions which permit a display of force by the judicial arm of the State."

The wisdom of such condition of the law is well doubted and there is a persistent effort to give relief to those who have controversies without the necessity of legal combat incident to the ordinary lawsuit.

In an interesting and able paper read before the Tennessee Bar Association (1920) by Mr. Gates, the principle is thus stated:

"It has been urged, and I think wisely, that frequently parties desire to obtain a mere declaration of right without seeking the coercive relief to which they might be entitled, and that such a procedure psychologically makes for better understanding between business men. I think we can readily appreciate that ordinarily parties to contracts would much prefer a mere declaration of their rights thereunder than to await a breach

and the seeking of coercive relief by one or the other. The antagonisms that are engendered in a bitterly fought lawsuit usually leave their scars. On the other hand, there is probably less bitterness occasioned in a proceeding in which the court is called upon to merely settle disputes or misunderstandings between parties over the construction of the contract or over the relative rights of the parties. It would enable the profession to remove the uncertainty and the doubt from matters that are being presented constantly to it. It would enable a party to obtain a determination of his rights without waiting for the other to become the aggressor. And there are many other arguments that may be advanced on behalf of this new departure."

And Prof. Sunderland, of Michigan University, 54 American Law Review, No. 2, page 173, announces the principle thus:

"Every case may by this means become in appearance, at least, a friendly suit. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. . . . When you ask for a declaration of right only you treat him as a gentleman."

Declaratory judgments in one form or another have been authorized in the English courts beginning with 1859. In that year the practice of the High Court of Chancery was amended so as to provide that "no suit in the said court shall be open to objection on the ground that a mere declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declaration of rights without granting consequential relief. (15 and 16 Vic., c. 86, s. 50.)

In 1873 the Judicature Act was passed and in 1883 Rule 5 of Order 25 was promulgated and it provided: "No action or proceeding shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." It will be observed that in this provision the remedy is not confined to the Court of Chancery.

The State of Rhode Island, as appears in General Laws 1909, Chapter 289, Section 19, adopted a provision as follows:

"No suit in equity shall be defeated on the ground that a mere declaratory decree is sought; and the court may make binding declaration of right in equity without granting consequential relief."

And later, by statute, it is provided as follows:

"Subject to rules any person claiming a right cognizable in a court of equity under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested."

And in the State of Connecticut, General Statutes 1918, Section 5113, provides:

"An action may be brought by any person claiming . . . any interest in . . . real or personal property . . . against any person who may claim . . . any interest . . . adverse to the plaintiff . . . for the purpose of determining such adverse . . . interest and to clear up all doubts and disputes and to quiet and settle the title to the same."

Since such legislation as has been passed by any of the States is based in a general way upon the English Act, it seems well to insert it here. It is as follows:

"Section 1. Scope. In any action the plaintiff may ask for a declaration of rights, either alone or with other relief, in his complaint; and the court may make a binding declaration of rights, whether or not consequential relief is or could be claimed at the time.

"Section 2. Construction. Any person interested under a deed, will, contract or other written instrument or whose rights are affected by a statute, may bring an action to determine any question of construction or validity arising under the instrument or statute and for a declaration of his rights or duties thereunder.

"Section 3. Before Breach. A contract may be construed before there has been a breach thereof.

"Section 4. Discretionary. The court may refuse to exercise the power to declare rights and to construe instruments in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary and proper at the time under all the circumstances.

"Section 5. Executors, etc. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust*, in the administration of trust or of the estate of a decedent, an infant, a lunatic or an insolvent, may bring an action:

"(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

"(2) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

"(3) To determine any question arising in the administration of the estate or trust, including questions of construction.

"Section 6. Parties. When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall, except as otherwise provided in these rules, prejudice the rights of persons not parties to the action.

"Section 7. Attorney-General. In any action which involves the validity of a statute the Attorney-General shall, before the judgment is entered, be notified by the party attacking the statute, and shall be entitled to be heard upon such question.

"Section 8. Municipal Ordinance. In any action which involves the validity of a municipal ordinance the corresponding municipal legal officer shall be similarly notified and entitled to be heard; and if the ordinance is alleged to be unconstitutional the Attorney-General shall also be notified and entitled to be heard."

This act is set out, with notes and citations of cases under each section, in Central Law Journal, Volume 91, page 264. In that article it is said:

"The American Bar Association at its last session in St. Louis on August 27, 1920, after an interesting debate and under the persuasive eloquence of Mr. T. J. O'Donnell, of Denver, Colo.; and Hon. Charles E. Hughes, of New York, voted in favor of a resolution asking Congress to grant to the federal courts

jurisdiction to 'declare the rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have due force of a final judgment.'"

There seems to have arisen in the last few years a new interest in the principles set out in the English Act and applied in the English cases based upon the Act, so that we have legislation in several States on declaratory judgments—Michigan Act in 1919, Wisconsin Act same year, Florida Act the same year, Kansas Act 1921.

Since the Kansas Act is the latest in point of time and was based on the light of extensive discussion of the principles contained in the other Acts, particularly in the Michigan Act which the Supreme Court of Michigan held unconstitutional and to which I shall later refer, it may be well to set it out in full, as follows:

"AN ACT Relating to Declaratory Judgments.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

"Section 2. Declaratory judgments may be obtained and reviewed as other judgments, according to the code of civil procedure.

"Section 3. Further relief based on a declaratory judgment may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaration of right to show cause why further relief should not be granted forthwith.

"Section 4. When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted

to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

"Section 5. The parties to a proceeding to obtain a declaratory judgment may stipulate with reference to the allowance of costs, and in the absence of such stipulation the court may make such an award of costs as may seem equitable and just.

"Section 6. This act is declared to be remedial; its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

"Section 7. This act shall take effect on publication in the official State paper."

In Yale Law Journal, Vol. 29, No. 8, page 908, Mr. George W. Wickersham, late Attorney-General of the United States, discusses the New York Practice Act, which contains a provision authorizing declaratory judgments. He says:

"A new provision is inserted empowering the Supreme Court in any action or proceeding 'to declare rights and other legal relations on request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment.' The rules of court are to make such provisions as shall be necessary and proper to carry the provisions of this section into effect. Judgment may be rendered by the court in favor of any party or parties and against any party or parties at any stage of the action or appeal if warranted by the pleadings or admissions of the party or parties and the judgment may be rendered by the court as to a part of the cause of action and the action proceed as to the remaining issues as justice may require."

And—

"All these provisions are in line with the most enlightened and advanced views of simplification of practice in courts."

At the last Conference of Commissioners on Uniform State Laws, held in St. Louis, August of last year, at which nearly all of the States of the Union were represented (Kentucky, I regret to say, being one of the few not so represented), the Commission had under

consideration the principle of declaratory judgments. An interesting report was made and a tentative draft of a law to be submitted to the several States was approved by the commission and passed to the next session, which meets with the American Bar Association at Cincinnati in August of this year, for revision and review. I append to this paper a copy of the proposed statute for consideration of this Association.

An able article reviewing this tentative draft, together with citation of authorities, by Prof. Edwin M. Borchard, of Yale, will be found in the Harvard Law Review, May, 1921, Vol. 34, No. 7, page 697.

There have been many adjudications under the declaratory judgment enactments. The practice has grown in favor in the English courts. In one volume of the reports for the year 1919 it is noted that over half the cases reported were declaratory judgments, and in a volume for 1917 an examination of the cases decided on appeal discloses that sixty-seven per cent were declaratory actions. This, of course, takes no note of the vast number of cases that were decided in the lower courts and not appealed, and it has been said that it may be fairly assumed that the lower court decisions were more numerous in proportion because it is reasonable to suppose that declaratory actions are less likely to be appealed than cases where coercive judgments are rendered.

In this paper it is possible to select and note only a few cases illustrating the principles of the declaratory judgment.

In *Zinc Corporation v. Hursch*, 1 K. B. 541, there is a declaration that a contract by an Australian firm to supply their whole output of zinc to a German resident in Germany was wholly dissolved by the declaration of war and not merely suspended, so that the Australian knew he was free to dispose of his product as he saw fit.

In *Stevenson v. Aktiengesellschaft* (1916), 1 K. B. 763, there was a partnership between an Englishman resident in England and a German resident in Germany for the manufacture in England of a certain article. The profits from the manufacture of this article rose materially after the outbreak of the war, and the Englishman desired to know what the rights of his German partner were in those

war profits. He obtained a declaration that the partnership with an alien enemy was completely dissolved upon the outbreak of the war and that the enemy had no share in the profits subsequently earned. Of course, it would follow that he was liable for no losses.

Most English leases contain a clause requiring the lessor's consent to sublet, but providing that such consent should not be unreasonably withheld. Very frequently a lessor will attempt to impose unreasonable conditions upon giving consent, such as increased rent or a money payment, and the lessee will then bring an action asking merely for a declaration that the landlord's consent is being unreasonably withheld. Such a declaration was made in *Young v. Ashley Gardens* (1903), 2 Ch. 113 C. A., where Cozens-Hardy, L. J., said:

"If we refused a declaration here the lessee's property would diminish in value, as his assignee would run the risk of being turned out by the lessor. I can not imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order."

Query: Under our law where, in a lease, a provision is made that the premises can not be sublet without the consent of the lessor, would the court hold that unreasonable refusal to consent would be permitted?

In the case of *Societe Maritime v. Venus S. S. Co.*, 9 Commercial Cases 289 (K. B. D., 1904), the facts are: A contracted with B to load 75,000 tons of ore a year on B's ships for a period of years. When the contract had still $1\frac{1}{2}$ years to run, C informed A that B had assigned his contract to C and that C would claim the benefit of it. C tendered a ship to be loaded and A refused to load it. A then brought an action for a declaration that he was not bound to load C's ships under the contract with B. Channell, J., in giving judgment, said:

"In reference to a mercantile transaction of this sort parties are entitled now to come into court and say, 'It is important to us in reference to this contract, which has a year and a half to run, to know whether we are bound by it or not.' . . . They are not entitled to come and ask a court of law for an opinion upon a speculative or academic question; but

showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable for heavy damages for not performing it for the space of the next year and a half."

In *Thompson Bros. & Company v. Amis*, (1917) 2 Ch. 211, a dispute arose between the parties over the proper construction of the contract of employment whereby the plaintiffs employed the defendant. The defendant, by way of compensation, was entitled to receive a sum equivalent to a certain share of the net divisible profits of the firm. The plaintiffs sought to deduct from the return for excess profits made by them the real remuneration paid to the defendant. This the surveyor of taxes declined to allow. The plaintiffs gave notice of an appeal. The defendant insisted upon a settlement under his contract. Thereupon the plaintiffs sought a declaration that they were entitled to recover from the defendant as and when the return was paid, by way of excess profits duty in respect of the increased remuneration of the defendant for the period in controversy. A declaration was made as required. In other words, the question with which the parties were confronted was whether or not the manager's additional compensation ought to be estimated before or after the deduction of the excess profits tax. The plaintiffs were not obliged to wait until there had been a demand made on them by the manager for the larger compensation, but obtained from the court a declaration as to the proper basis of computation.

In *Mayor of Bayonne v. East Jersey Water Company*, 108 Atl. 121, the city of Bayonne had a contract with the New York and New Jersey Water Company to supply it with water and the latter company in turn obtained its water from the East Jersey Water Company. The New York and New Jersey Water Company sold its plant and assigned its contract with the East Jersey Water Company to the city of Bayonne. Immediately thereafter the East Jersey Water Company notified the city that at the expiration of a certain date it would no longer supply the city with water, assigning as reason therefor that it had no contract with the city and that the assignment of the New York and New Jersey Water Company relieved it from further liability. Thereupon the city filed suit for

an injunction and a declaration of rights. And out of this arose three questions for determination: (1) Did the purchase by the city terminate the obligations of the East Jersey Water Company; (2) If not ended by the purchase, will it end on September 6, 1919; and (3) if not terminated by the purchase or if it does not terminate on September 6, 1919, but continues until June 21, 1929, is the East Jersey Water Company under any obligation to supply Bayonne with water after that date, and if so, then is its obligation to supply water only for municipal purposes or also for resale to outside consumers? And the court proceeded to settle the rights of the parties under the contract, not only the right to an injunction presently, but adjudged the rights, some of which would only arise in the future. Through this means a complete disposition was had, once for all time—all of the matters in controversy being judicially settled and all doubts or questions of construction that might arise over the contract resolved, and the parties knew what their respective rights and duties were.

The Michigan statute was held unconstitutional in the case of *Anway v. Grand Rapids Railway Co.* (Michigan Supreme Court, September, 1920), 179 N. W. Reporter, 305, 211 Mich. 592.

Anway was a conductor employed by the Grand Rapids Railway Company. The statute prohibited the employment of such employes more than six days in the week, except under certain conditions of emergency, and fixed a penalty. Anway desired to work more than six days in the week and the railway company desired to employ him more than six days. Anway instituted his action seeking a declaratory judgment that if the railway company should employ him to work more than six days in the week that it would not be a violation of the law, in effect holding unconstitutional the Act against such employment. A labor union, of which Anway was not a member, interplead and contended that the statute should be construed to prevent plaintiff from working more than six days in the week. From a declaratory judgment upholding plaintiff's contention an appeal was taken to the Supreme Court. So much of the Michigan statute with reference to declaratory judgments above referred to, but not quoted, as was brought in question were Sections 1 and 3, as follows:

"Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby and the court may make binding declarations of rights whether any consequential relief is or could be claimed or not, including the determination at the instance of any one claiming to be interested under a deed, will or other written instrument of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

"Section 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief for an order directed to any party or parties whose rights have been determined by such declaration to show cause why further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the court in such order."

The opinion reversing the case and holding the Act unconstitutional was by a divided court, the Chief Justice for himself and five of his associates holding the Act unconstitutional, and Judge Sharpe for himself and one other member of the court held to the contrary. The opinion concludes that the duties imposed upon the court under the statute are non-judicial in their nature; but the question in the case presented was a moot question; that the Legislature had no right to impose upon the court any duty not embraced in its judicial power; that it will not determine moot questions; that it is not an exercise of judicial power where a judgment rendered is not to be enforced by the court. It will be readily seen from the statement of fact that there was no controversy between Anway and the railway company and therefore it might well be said that the question was a moot question, and under this state of case the court could well have reversed and directed a dismissal of the petition. It was not necessary to decide the question of the constitutionality of the declaratory judgment statute in that case. No party to the record raised that question. The court, however, invited the Attorney-General and Prof. Sunderland, who had written the very able argument above referred to, published in *American Law Review*, Vol. 54, No. 2, page 161, entitled "The Courts as Authorized Legal Advisers of the People," to appear and brief the case. The

court was manifestly unduly impressed with the title of that article by Prof. Sunderland and said in the course of the opinion that the courts should pause long enough to consider fully the constitutionality of the act before it should assume to become the adviser of three millions of people in the State of Michigan.

A large number of authorities are cited in support of the contention that the court will not decide a moot question. Those authorities, it seems to me, are not applicable to the question before the court. If there were no controversy between the parties appealing to the court, any decision of the court would be a decision of a moot question. It is further argued strenuously by the court in its opinion that it was without the power of the Legislature to impose upon the court the duty to decide questions that did not arise in a controversy between contending litigants, and further takes the position that unless the court in rendering the judgment is authorized also to give consequential relief that the question is not one that the court has jurisdiction to decide. In the minority opinion it is very properly said:

“Herein lies the distinction between the declaratory judgment and moot cases or advisory opinions. A declaratory judgment is a final one forever binding on the parties on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby; while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between the interested parties.”

In criticism of the majority opinion it is said that the court does not recognize the distinction between a declaratory judgment which binds the parties and a mere advisory opinion or a decision of a moot case.

The majority of the court quoted liberally from the opinion in *Muskrat v. United States*, 219 U. S. 346, and says:

“This case should forever put at rest this question. It is absolutely decisive of the question before us.”

In the *Muskrat* case it appears that *Muskrat* and others, on behalf of themselves and other Cherokee citizens, were authorized to

institute proceedings in the Court of Claims with a right of appeal to the Supreme Court.

“ . . . to determine the validity of any Acts of Congress passed since said Act of July 1, 1902, in so far as said Acts, or any of them, attempted to increase or extend the restrictions upon alienation, incumbrance or the right to lease allotments of land of Cherokee citizens or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in said Act of July 1, 1902.”

The proceedings under that Act were instituted and brought to the Supreme Court, the court holding that the Act of March 1, 1907, above quoted, by which the Supreme Court was authorized to determine the validity of various acts having reference to the Indian tribes was in excess of legislative authority and that Congress had no power to confer power other than judicial power upon the court, or to require of it other than judicial action; that the proceedings there under consideration did not require the exercise of judicial power and ordered the dismissal of the proceedings. The Supreme Court said in that opinion:

“Judicial power is the power of the court to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. (Miller Const. 314.) The exercise of judicial power is limited to cases and controversies. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution the power to exercise it is nowhere conferred.”

It will be noted that in that case the parties whose interests would be affected by the decision of the Supreme Court were in large numbers not before the court and the statute imposing upon the court the duty to determine the rights of the parties was in effect the duty merely to pass upon the constitutionality of a congressional enactment without the parties being before the court. This the court held was beyond the power of Congress. As to the Muskrat case, ex-Justice Charles E. Hughes, now Secretary of State, in a supplemental statement to the recent report of the committee having the

matter of declaratory judgments in charge, says (Central Law Journal, Vol. 91, p. 435) :

"It is true that the Muskrat case dealt with the validity of an Act of Congress, but the ground of the decision was the fundamental one that the judicial power extended to 'cases and controversies,' that is, that the judicial power was 'the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' (219 U. S., p. 361.) It was not because the question was the determination of the validity of an Act of Congress, but because this question did not arise in an actual controversy, that the court found itself without power to determine it. Had there been an actual controversy, the question of the validity of an Act of Congress, or any other question properly brought before the court, could have been determined. But in the absence of an actual controversy, neither that question nor any other could properly be determined by the court. It was pointed out that the power to decide upon the constitutional validity of a statute existed only when the court was called upon to determine an actual controversy. It was said that the whole purpose of the law there in question was to determine the validity of the class of legislation, not in a suit arising between parties concerning a property right necessarily involved in the decision, but in a proceeding against the government in its sovereign capacity. The United States was to be made a defendant, but it had no interest adverse to the claimant's, the suit being brought solely to determine the validity of the legislation in question.

"I do not think, therefore, that it distinguishes the Muskrat case to say that it related to the determination of constitutional questions, for this fails to state the ground upon which the court found itself unable to determine the constitutional question. I think that the paragraphs relating to the Muskrat case should be changed, and particularly that portion which states the distinction between the Muskrat case and the proposed legislation. I do not think it should be said that probably legislation, conferring a power to determine the validity of an Act of Congress, would be within the rule in the Muskrat case. The question will be whether there is a 'case' or 'actual controversy,' and if there is not, it may be assumed that the statute would be held to be invalid whether or not it extended to the determination of constitutional questions. The point of distinction, it seems to me, should be, and it is sufficient to state, simply that the proposed legislation is intended to deal only with actual

controversies and proposes that where there is an actual controversy between litigants the court may render a declaratory judgment."

I think it a fair conclusion that where there is an actual controversy and the parties are before the court, the courts may determine such controversy under legislative enactment so authorizing, although consequential relief is not asked.

By comparing the sections of the Michigan Act with those of the Kansas Act, it will be observed that in the Michigan Act it is not expressly stipulated that the declaratory judgment is limited to actual controversies, while Section 1 of the Kansas Act, passed subsequent to the Michigan Act and after the decision in the *Anway* case, begins "In cases of actual controversy."

Such judgments are now rendered by the courts without express statutory authority and without necessarily being enforced by process of the court, such as a judgment to quiet title, a judgment declaring marriages void or valid, a judgment construing wills or other written instruments, confirming the validity of municipal bond issues, a judgment directing an executor or trustee in administering his trust, a judgment on appeal by the appellate court in a criminal case reviewing the decisions of the trial court in admitting and rejecting evidence and in giving and refusing instructions in a case where there is a mistrial. (*Commonwealth v. Matthews*, 89 Ky. 287.) And in a case where there has been an acquittal the court can and will declare the law. (Criminal Code, Secs. 335, 336 and 337.)

A case worthy of note is *Barth, Mayor v. McCann*, Police Judge, 29 Ky. L. R. 707. In 1906 the question of closing the saloons on Sunday was acute in Louisville. Warrants had been taken out against various saloonkeepers charging violation of Section 1303 of the Kentucky Statutes, providing:

"Any person who shall on Sunday keep open a barroom or other place for the sale of spirituous, vinous or malt liquors, or who shall sell or otherwise dispose of such liquors or any of them, shall be fined not less than ten nor more than fifty dollars for each offense."

McCann, police judge, sustained demurrers to the warrants on the ground that the statute was unconstitutional, amongst other grounds. The mayor, under the provision of the statute that it should be his duty to see that the ordinances and laws of the city were enforced, filed in the Court of Appeals his petition for a mandamus in the name of the Commonwealth in his official capacity as relator, seeking to have a writ issued against the police judge, compelling him to hear and try the writs. The defendant demurred to the petition, claiming that the plaintiff had no legal capacity to maintain the action and the court had no jurisdiction of the subject matter and the petition did not state a cause of action. The Court of Appeals held that it was McCann's duty as police judge to enforce the law, but denied the motion for a mandamus by an equally divided court, three of the judges being of the opinion that the court has the power under the Constitution to award the writ and three of them that it has not such power, and therefore the writ was denied; Judge Cantrill, then a member of the court, being ill and unable to act. Under this state of case the court, not being willing to issue the writ and, it seems, from sheer necessity, made a declaration as to the law and said:

"In view of the importance of the questions involved, we have expressed our views as above indicated, assuming when the judge of the city court is advised by this court that the statute is constitutional, it will be his pleasure to enforce the law and discharge his duty faithfully in upholding the mayor and police of the city in the efforts to do so."

The effect of the advisory opinion was that the constitutionality of Section 1303 of the statute and the right of the Commonwealth and of the city to have the statute and ordinances against the sale of liquor on Sunday enforced and the right to keep open saloons or sell liquor on Sunday were no longer undetermined questions.

Siler v. White Star Coal Co., 190 Ky. 7. A careful reading of the opinion would indicate that the court construed and declared the meaning of a contract where there was an actual controversy between the parties as to its meaning. Without such construction the parties in that case could not have known what their rights were and

while it does not appear in the opinion, it does appear in the record, that the court obtained jurisdiction of the case because there was some small amount of royalty due and the rights that the respective parties had in that royalty were determined in the judgment appealed from. It would be well that the construction of such contract should be permitted by statutory enactment and not be dependent upon whether there was or was not royalty then to be divided.

A frequent confusion of decisions upon law questions is found. It is most difficult for counsel to advise his client as to what the courts will hold upon the state of case submitted to him by his client. He examines the authorities and may think that he finds decisions that will warrant him in advising his client and yet he knows that in taking his advice and acting upon it, the client takes a chance as to what the ultimate result may be. Mr. Bigelow, in his work on Torts, 8th Edition, page 4, says:

“What is meant by ‘legal right?’ The specific answer is whatever the judge, or judge and jury, in a particular case may decide. As a matter of fact, most cases in the higher courts are cases in which the judges must decide the questions of right. Such, indeed, is the complexity of human affairs that even ‘natural’ rights so called and rights already strictly defined may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law.”

How often a man will forego a claim of what he considers a legal right, rather than chance the decision of the court upon it after long and expensive litigation. A declaratory judgment would state the right in advance.

The declaratory judgment takes away no right of procedure now authorized. It rests within the sound discretion of the court to award it or not to award it. Of course, this discretion is a judicial, and not an arbitrary discretion.

The Michigan and the Kansas Statutes both state, it seems to me, the true ground for the declaratory judgment, that the statute shall be “liberally construed and liberally administered with a view of making the courts more serviceable to the people.” Its discussion and consideration can well be made to turn upon this principle. It

should not be considered in the light of whether or not it will increase or decrease litigation. It is not evident that it will do either. The courts are created to administer justice in order to preserve the well-being of society. They are but instrumentalities created by the State for this purpose. The bar are officers of the court to aid the court in this high purpose, and I can well see that to declare the rights of parties before either has breached a right of the other would call for less work from the courts than to settle the disputes after the breach has occurred and losses on the one side or the other have been sustained.

A very excellent criticism of the majority opinion in the *Anway* case by Prof. Borchard, of Yale Law School, will be found in 30 *Yale Law Journal*, December, 1920, No. 2, page 161. It is there well said:

“ . . . When it is recalled that England has for two centuries been familiar with the doctrine of separation of powers and that the existing provision for declaratory judgments was adopted by the courts themselves under their rule-making authority and not imposed on them by Act of Parliament, the validity of the Michigan court's argument is weakened. No English court, nor probably any other but this court, could possibly conceive that a declaratory judgment was not the exercise of judicial power.”

A similar criticism may be found in *Columbia Law Journal*, Vol. 21, No. 2, page 168, February, 1921, in which it seems to be demonstrated that the majority opinion in the *Anway* case is unsound; and in the same volume, page 115, there is a discussion approving the power and the policy of legislative action authorizing declaratory judgments and supporting the conclusion by numerous authorities. In no discussion that I have had access to, is the majority opinion in the *Anway* case approved.

For the benefit of those who would prosecute the investigation further I append a memorandum of publications where the question is discussed, and in every instance with approval.

I have been impressed anew, while preparing this paper, with the real service that is being rendered the courts, the profession and

the public by the law journals. Every lawyer should have at least one first-class law magazine coming regularly to his desk.

The value of the declaratory judgment is evidenced by the fact that it is constantly used and for many years has been used, not only in the courts of England, but also in Scotland, Ireland, India, Ontario, British Columbia and other Canadian provinces, in Australia, New Zealand and several of the Australian States, and in Germany and Austria.

The American Bar Association approved this mode of procedure and has been, for several terms, through its committee, pressing upon Congress the need of legislation to establish it in the Federal courts.

The American Judicature Society has given its approval to the declaratory judgment.

The Commissioners on Reform of State Laws have given their unqualified approval and have prepared a tentative Act to be reviewed and later submitted to the legislatures of the various States. The Tennessee State Bar Association, at its 1920 meeting, gave its unanimous approval.

A bill authorizing the declaratory judgment will probably be presented at the next meeting of the Kentucky Legislature. If this Association is prepared to say that the declaratory judgment is a constitutional method of procedure and will "make the courts more serviceable to the people," such expression will go far toward inducing the Legislature to give its sanction.

I am glad to submit the question to the Association for such disposition as it thinks wise and right.

APPENDIX.

FIRST TENTATIVE DRAFT

OF

AN ACT RELATING TO DECLARATORY JUDGMENTS AND DECREES AND TO
MAKE UNIFORM THE LAW WITH REFERENCE THERETO.

Section 1. SCOPE. The courts of this State having jurisdiction in equity shall have power in any suit in equity or in any independent or interlocutory proceedings, to declare rights and other legal relations on written requests for such declaration, whether or not further relief is or could be claimed; and such declaration shall have the force of a final judgment or decree.

Section 2. CONSTRUCTION. Any person interested under a deed, will, contract, or other written instrument, or whose rights are affected by a statute, municipal ordinance or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance or franchise, and a declaration of rights or duties thereunder.

Section 3. BEFORE BREACH. A contract may be construed before there has been a breach thereof.

Section 4. EXECUTORS, ETC. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust*, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or duties in respect thereto.

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings or instruments.

Section 5. **PARTIES.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute the Attorney General of the State shall, before judgment is entered, be notified by the party attacking the statute, and shall be entitled to be heard upon such question. In any proceeding which involves the validity of a municipal ordinance or franchise, the law officer of the municipality shall be notified by the party attacking the ordinance or franchise, and shall be entitled to be heard upon such question. And if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be notified and be entitled to be heard.

Section 6. **DISCRETIONARY.** The court may refuse to exercise the power to declare rights or other legal relations in any proceeding where a decision under it would not terminate the uncertainty or controversy which gave rise to the proceeding, or in any proceeding where the declaration or construction is not necessary, and proper, at the time under all the circumstances.

Section 7. **RELIEF, AFFIRMATIVE OR NEGATIVE.** When declaratory relief is sought the declaration may be either affirmative or negative in form and effect.

Section 8. **PROCEDURE.** Declaratory relief may be obtained by means of the ordinary process and proceedings in equity, or by means of a request or petition in equity, as the nature of the case may require, and where a declaration of rights or other legal relations is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

Section 9. **EXECUTORY RELIEF.** Where further relief based upon a declaration of rights or other legal relations shall become necessary, or proper after such declaration has been made, application may be made on request or by petition to the court having jurisdiction to grant such relief for an order directed to any party or parties whose rights, or other legal relations have been determined by such declaration, to show cause why such further relief should

not be granted forthwith upon such reasonable notice as shall be prescribed by the court in its order.

Section 10. TRIAL BY JURY. In any suit or proceeding under this Act in which an issue of fact is involved, and a trial by jury of such issue is required by the Constitution or the laws of this State, such issue may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

Section 11. COSTS. Unless the parties shall agree by stipulation, as to the allowance thereof, costs in proceedings authorized by this Act, shall be allowed in accordance with the rules of practice, followed in proceedings in equity, wherever applicable and when not applicable costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party, or apportioned between them.

Section 12. ACT REMEDIAL, ETC. The enumeration of specific powers of the courts under this Act shall not be held or construed to limit or restrict in any manner the general powers conferred upon the courts by the first section of this Act. This Act is declared to be remedial, and is to be liberally construed and liberally administered with the view of making the courts more serviceable to the people.

Section 13. WORDS CONSTRUED. The word person wherever used in this Act shall be construed and held to include and mean any person, partnership, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever.

Section 14. COMMENCEMENT. This act shall be in force from and after the _____ day of _____, 19____.

PUBLISHED DISCUSSIONS.

Uniform Act, Declaratory Judgments, Borchard, Harvard Law Review, Vol. 34, No. 2, p. 697, May, 1921.

Declaratory Judgments, Journal American Judicature Society, Vol. 3, No. 1, p. 22, notes and cases.

Borchard's Brief before Committee on Judiciary on Bill (S. 5304) to Authorize Declaratory Judgments in Federal Courts.

Central Law Journal, Oct. 8, 1920, Vol. 91, No. 15, p. 264; English Act with notes.

Same, Vol. 91, p. 351, Nov., 12, 1920, Editorial.

Proceedings American Bar Association, 1920, Frank K. Dunn, of Illinois bar.

Massachusetts Law Quarterly, Vol. 4, No. 4, p. 250; American Judicature Society's proposed bill and notes.

Sunderland, "A Modern Evolution in Remedial Rights—The Declaratory Judgment," 16 Mich. L. Rev. 69 (1917). *

Borchard, "The Declaratory Judgment—a Needed Procedural Reform," 28 Yale L. J. 1, 105 (1918).

Sunderland, "The Courts as Authorized Legal Advisers of the People," 54 Amer. L. Rev. 101 (1920).

"The Declaratory Judgment," 20 Col. L. Rev. 106 (1920).

Kerr, "Declaration of Rights Without Consequential Relief," 53 Amer. L. Rev. 161 (1919).

Borchard, "Recent Declaratory Judgments," 29 Yale L. J. 545 (1920).

Dodd, "Progress of Preventive Justice," 6 Am. Bar Assn. J. 151 (Nov., 1920).

Gates, "Declaratory Relief," Proceedings of Tennessee Bar Assn. 41 (1920).

Medina, "Some Phases of the New York Civil Practice Act and Rules," 21 Columbia L. Rev. 113 (1921).

Proceedings Annual Conference, 1920, Commissioners on Uniform State Laws and Proceedings.